Supreme Court, U.S.
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No. 85-1907

In the Supreme Court of the United States

OCTOBER TERM, 1986

WALLACE RICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on the elements of a continuing criminal enterprise, as defined in 21 U.S.C. (& Supp. II) 848.

2. Whether the district court properly instructed the jury on the elements of a substantive violation of 18 U.S.C. 1962(c), part of the Racketeer Influenced and Corrupt Organizations Act (RICO).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 24-60) is reported at 757 F.2d 1359.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1985. The petition for a writ of certiorari was filed more than a year later, on May 19, 1986, and is therefore substantially out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to violate the narcotics laws, in violation of 21 U.S.C. 846; conducting a continuing criminal enterprise, in violation of 21 U.S.C. (& Supp. II) 848; possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841 (a)(1); participating in the affairs of an enterprise through a pattern of racketeering activity (RICO), in violation of 18 U.S.C. 1962(c); and conspiracy to violate the RICO statute, in violation of 18 U.S.C. 1962(d). He was sentenced to life imprisonment without parole on the continuing criminal enterprise count and a total fine on all counts of $125,000. Petitioner was also sentenced to 20 years' imprisonment on the substantive RICO count, to run consecutively to the life sentence on the continuing criminal enterprise count. Other concurrent terms of imprisonment were imposed on the remaining counts. The court of appeals affirmed. On October 7, 1985, this Court denied petitions for a writ of certiorari filed by two of petitioner's co-defendants. Nos. 84-1778 and 84-6972.

1. The evidence at trial showed that from 1972 to 1983 petitioner and six other individuals conducted a massive narcotics enterprise in New York, which they operated under the auspices of a governing body called the "Council." Each Council member had a separate narcotics business, employing subordinates to distribute heroin in his respective territory in New York. Council members also purchased and distributed large quantities of cocaine, marijuana, and phencyclidine (PCP). The Council operated by pooling the resources of its members, sharing narcotics sources, allocating sales territories, adjudicating dis-

putes among members, and handling the narcotics business of jailed members. To ensure the success of the operation and to maintain internal discipline, Council members routinely approved murders of suspected potential witnesses or individuals who had been insubordinate. Pet. App. 28-29.

Petitioner not only operated his own narcotics business, but also supplied the Council with new sources for heroin. For instance, in 1974 petitioner arranged for the Council to purchase massive amounts of heroin, and in early 1975 petitioner and Council member Joseph Hayden arranged for the expenditure of $250,000 in Council funds to purchase heroin from Carmine Pugliese. Tr. 449-457, 459-460. Petitioner also supplied Council members with most of the quinine and mannitol that they needed to dilute the heroin.

One of petitioner's suppliers was Lawrence Billings. Billings sold large quantities of quinine and mannitol to petitioner in 1974. In return, petitioner supplied Billings with heroin. Billings also acted as a heroin distributor for petitioner. Tr. 513-514. In December 1974, petitioner learned that Billings was an informant and that he had robbed petitioner's real estate office. Petitioner apprised the Council of what he had learned and the Council voted to have Billings killed. Tr. 279-280, 515-516. On January 9, 1975, petitioner shot Billings in the head three times. Billings, however, survived the shooting. Tr. 280-285.[1]

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[1] In February 1975, after Billings testified before a grand jury about the attempted homicide, an emissary of petitioner offered Billings $20,000 to refuse to testify again. Billings thereafter escaped from protective custody and refused to testify when called as a witness at petitioner's trial for attempted murder. Tr. 287-289, 341.

As a member of the Council, petitioner agreed to the murder of others as well. In the summer of 1975, petitioner reported to the Council that the murder of two other suspected informants had been carried out, and he described the murders in detail. Tr. 520-522.

Petitioner was incarcerated on state narcotics charges in 1977, but he continued to be active in the business of the Council. Through his wife, Natalie, petitioner continued his business of selling heroin and heroin dilutants. Two witnesses testified at trial that petitioner supervised his wife's narcotics activities while he was imprisoned. Tr. 578, 2879-2880. Corroboration of petitioner's continued involvement in Council activities was furnished by prison records showing that several members of his narcotics organization visited him while he was imprisoned. GX 221.

In October 1982, after petitioner had been released from prison, he and Council member Frank James arranged to purchase heroin from undercover agent Nancy Burgstahler. At a meeting in Manhattan, petitioner questioned Burgstahler closely about the quality of the heroin she was selling. Burgstahler gave James a sample of the heroin the next day, and they agreed to consummate a sale. On the day of the proposed sale, petitioner and James were arrested together in Manhattan. Tr. 3425-3444.

2. Petitioner testified in his own defense at trial. He admitted that he had been in the narcotics business from 1973 until his incarceration in 1976, but he denied knowing that his wife was carrying on the business while he was in prison. Petitioner also admitted that he shot Billings, but he claimed that the shooting was in retaliation for the robbery and that

it was unrelated to Billings' role as an informant. Petitioner agreed that he had met with Agent Burgstahler, but he claimed that their meeting concerned nude photographs and that his discussions with her about drugs were not serious. Tr. 4572-4683.

ARGUMENT

At the outset, we note that the petition is approxiately one year out of time. This excessive tardiness alone should be a sufficient ground for denying the petition. We further note that the court of appeals did not consider any of the issues raised by petitioner here to be worthy of discussion in its lengthy opinion affirming the convictions of petitioner and his co-defendants. We agree with the conclusion of the court of appeals that each of petitioner's claims is insubstantial.

1. a. Petitioner contends (Pet. 8-13) that the district court erred in failing to charge the jury that it must find that petitioner personally committed three predicate offenses as a prerequisite to convicting him on the continuing criminal enterprise count. This claim is based on a misreading of the jury instructions.

The district court charged the jury that the government had to prove that petitioner had committed "one or more felony violations of the federal narcotics laws." C.A. App. 255-264. The court then charged that the continuing criminal enterprise statute required proof that petitioner's "conduct in committing one or more of these offenses was part of a continuing series of violations by him of the federal drug laws." *Id.* at 264. Not only does this instruction track the lan-

guage of Section 848(b)(2),[2] but it clearly did not permit the jury to convict petitioner on the basis of a single narcotics violation, as petitioner suggests. To be sure, the district court did not tell the jury that a "continuing series of violations" refers to three or more violations, as several courts have construed Section 848(b)(2) to mean. See, *e.g.*, *United States* v. *Brantley*, 733 F.2d 1429, 1436 (11th Cir. 1984), cert. denied, No. 84-5594 (Feb. 25, 1985); *United States* v. *Sinito*, 723 F.2d 1250, 1261 (6th Cir. 1983), cert. denied, 469 U.S. 817 (1984); *United States* v. *Phillips*, 664 F.2d 971, 1013 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982). But there is no requirement that the court define such a common everyday term as "continuing series" for the jury. See *United States* v. *Marino*, 639 F.2d 882, 888-889 (2d Cir.), cert. denied, 454 U.S. 825 (1981); *United States* v. *Johnson*, 575 F.2d 1347, 1357-1358 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979). In any case, petitioner did not object to the court's failure to specify a minimum number of violations, and the omission, if error at all, surely did not constitute plain error. See Fed. R. Crim. P. 30 and 52(b).

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[2] Section 848(b) provides that one engages in a continuing criminal enterprise if—

> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

b. Petitioner also argues (Pet. 13-16) that the trial court should have charged the jury that to satisfy the statute of limitations applicable to the continuing criminal enterprise count it was required to find that petitioner acted as a supervisor, manager, or organizer of the narcotics enterprise during the five years preceding the return of the indictment. Petitioner concedes that the evidence showed that he engaged in narcotics transactions during this period, but he claims that because he was in jail from 1977 to 1982 the jury could not have found that he was a supervisor of the enterprise during that time.

Petitioner again misreads the jury instructions. The court instructed the jury that it "must find beyond a reasonable doubt that one of the violations in the continuing series of violations I have mentioned occurred within five years of March 17, 1983," the filing date of the indictment (C.A. App. 268). The court also charged that in order to convict a defendant of a Section 848 offense, the jury had to find that petitioner committed a predicate federal narcotics felony (C.A. App. 255); that such felony was part of a "continuing series" of federal narcotics violations (*id.* at 264); that such "continuing series" of violations must have been committed by petitioner "in concert with five or more persons" (*id.* at 265-266); and that petitioner must have "occupied the position of organizer, supervisor or manager with respect to such five persons" (*id.* at 266). Thus, when read in context (*Cupp* v. *Naughton*, 414 U.S. 141, 146-147 (1973)), the instructions required the jury to find that petitioner occupied the position of manager, supervisor, or organizer with respect to each violation in the "continuing series," including the violation that

occurred within five years of the indictment. Contrary to petitioner's contention (Pet. 15-16), there was ample evidence from which the jury could have concluded that he acted in a managerial capacity during that five-year period, even though he was imprisoned for much of it.

2. The district court also properly charged the jury with respect to the RICO count. Petitioner argues (Pet. 17-23) that the instructions relating to the timing of the two predicate offenses, although not incorrect, were confusing. Petitioner did not object to this portion of the charge in the district court; accordingly, he cannot prevail on this claim unless a miscarriage of justice has occurred. *United States* v. *Frady*, 456 U.S. 152, 163 (1982); accord, *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 14. Not only has petitioner failed to show plain error, but the court's instructions were both clear and correct.

To be convicted of violating the RICO statute, the government must prove the commission of two racketeering acts that occurred within ten years of each other (18 U.S.C. 1961(5)). To satisfy the statute of limitations, the government must prove that one of those acts occurred within five years of the date of the indictment. The district court's charge covered both of these requirements. First, with respect to the statute of limitations, the court charged, "[Y]ou must find beyond a reasonable doubt that the racketeering conspiracy continued in existence to a date within five years of the filing of those charges, which occurred on August 25, 1983. Moreover, you must find that [petitioner] was a member of the conspiracy during the five years preceding August 25, 1983." C.A. App. 302-303. Furthermore, as petitioner concedes (Pet. 18-

19), the court charged the jury on several occasions that the RICO count required proof that two or more racketeering acts were committed within ten years of each other. Petitioner complains that "[t]he trial court failed to instruct the jury that the one act committed within five years of the date of the indictment must be one of the two acts that were committed within ten years of each other" (Pet. 19). This argument is frivolous. In this case, every predicate act charged occurred within the ten-year period prior to the date of the indictment. And petitioner was specifically convicted on the substantive charge of possessing heroin with intent to distribute it in 1982; that offense was a racketeering act that occurred within one year of the indictment. Hence there can be no doubt that the jury found both that the five-year statute of limitations was satisfied and that the predicate acts were committed within ten years of each other.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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